FILED

MAR 13 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ANASTACIO BECERRA-CORTEZ, Defendant - Appellant.	No. 05-30033 D.C. No. CR-04-00178-LRS MEMORANDUM[*]

Appeal from the United States District Court
for the Eastern District of Washington
Lonny R. Suko, District Judge, Presiding

Submitted March 9, 2006[**]
Seattle, Washington

Before: O'SCANNLAIN, SILVERMAN, and GOULD, Circuit Judges.

Anastacio Becerra-Cortez appeals his 46-month sentence imposed after he pled guilty to the offense of being an Alien in the United States after Deportation

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[**] This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review Becerra-Cortez's 46-month sentence for reasonableness. *United States v. Booker*, 543 U.S. 220, 261 (2005). At the sentencing hearing, the district court weighed the Sentencing Guidelines range of 46 to 57 months and considered other 18 U.S.C. § 3553(a) sentencing factors, noting that Becerra-Cortez's prior drug conviction, multiple returns to the United States following deportations, and significant criminal history did not justify a sentence below the applicable Guidelines range.

The district court also considered Becerra-Cortez's argument for a downward departure or variance from the Guideline range based on his concession of deportability. Becerra-Cortez first conceded at the sentencing hearing that his concession of deportability under the circumstances would not warrant a departure under prior Ninth Circuit precedent, but argued that a lower sentence was justified based on the panel decision in *Morales-Izquierdo*. *See Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004), *opinion withdrawn pending en banc rehearing*, 423 F.3d 1118, 1119 (9th Cir. 2005). Becerra-Cortez argued that his concession would allow the government to avoid the costs of holding an immigration hearing. *See Morales-Izquierdo*, 388 F.3d at 1305 (holding that the

reinstatement procedure was *ultra vires* to the Immigration and Nationality Act if no immigration hearing was held before a deportation). However, according to the government, its immigration policy after *Morales-Izquierdo* was to require immigration hearings for all deportations, such that the concession was not a sufficient benefit to warrant departure. Because the panel opinion in *Morales-Izquierdo* is currently withheld during en banc rehearing, such that a prior deportation order can be reinstated without an immigration hearing, Becerra-Cortez's concession would have even less value to the government.

Becerra-Cortez also agreed with the district court that the concession of deportability would not typically justify a downward departure. Although Ninth Circuit precedent held that a sentencing court may not categorically deny a downward departure based on a concession to deportation, the sentencing court must find that the concession takes that case out of the Guideline's heartland. *See United States v. Rodriguez-Lopez*, 198 F.3d 773, 778 (9th Cir. 1999) ("Because the absence of government consent does not preclude departures on the basis of a stipulated deportation in all instances, the district court should have examined the facts and circumstances of Rodriguez-Lopez's case and determined whether, given those facts and circumstances, his stipulation took the case out of the heartland.").

The district court was reluctant to treat this concession as sufficient for a departure or a variance from the Guideline range under the circumstances.

The district court recognized that it had the discretionary authority to consider factors after *Booker* that were not recognized by the Guidelines and it chose a sentence within the appropriate Guidelines range based on its consideration of factors listed in § 3553(a). Therefore, we conclude that the sentence is reasonable. *See Booker*, 543 U.S. at 261; *United States v. Plouffe*, 436 F.3d 1062, 1062 (9th Cir. 2006).

The district court did not err in applying an enhancement based on a prior felony drug trafficking conviction under U.S.S.G. § 2L1.2(a). The fact of a prior conviction does not need to be admitted by the defendant or proven to a jury beyond a reasonable doubt for purposes of sentencing. *See Booker*, 543 U.S. at 244; *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998). "Although recent Supreme Court jurisprudence has perhaps called into question the continuing viability of *Almendarez-Torres*, we are bound to follow a controlling Supreme Court precedent until it is explicitly overruled by that Court." *United States v. Weiland*, 420 F.3d 1062, 1080 n.16 (9th Cir. 2005) (citation omitted).

AFFIRMED.